

Rule 5, Ariz. R. Crim. P.

PRELIMINARY HEARING – Magistrate at preliminary hearing can only amend charging document to correct minor mistakes in allegations of fact....Revised 12/2009

Rule 5.4(a), Ariz. R. Crim. P., provides that a magistrate shall hold a defendant to answer “[i]f it appears from the evidence that there is probable cause to believe that an offense has been committed and that the defendant committed it.” Rule 5.4(b) deals with the magistrate’s power to amend the complaint to conform to the evidence presented at the preliminary hearing. That subsection states that “[t]he complaint may be amended at any time to conform to the evidence, but the magistrate shall not hold the defendant to answer for a crime different from that charged in the original complaint.”

The Comment to Rule 5.4(b) explains the limits of the magistrate’s power under this rule:

The magistrate – whether a justice, judge, justice of the peace, or city magistrate – is authorized to amend the complaint to correct only minor mistakes in allegations of fact. He has no power to amend the charge; he must either bind the defendant over or dismiss the complaint. Thereafter the prosecutor may file another complaint. This is the Arizona rule.

See State v. Superior Court, 137 Ariz. 534, 535-36, 672 P.2d 199, 200-201 (App. 1983), in which the State filed a complaint charging first degree murder but the magistrate bound the defendant over to superior court on a lesser charge of second degree murder. The Court of Appeals found that the magistrate erred because under Rule 5.3(a), the magistrate had only two options – to find probable cause on the charge as stated in the complaint, or to find that probable cause was lacking. The magistrate lacked the power to amend the substantive charge.

Similarly, in *State v. Colvin*, 81 Ariz. 388, 307 P.2d 98 (1957) (decided under a previous version of the Rules), the State filed a complaint charging the defendant with

committing three separate aggravated assaults on one victim. At the preliminary hearing, however, the State presented evidence that the defendant had also assaulted two other victims and, over the defense's objection, the magistrate amended the complaint to charge assaults on those victims. The Arizona Supreme Court held that by doing so, the magistrate denied the defendant her right to a preliminary hearing on the charges relating to the other two victims. *Id.* at 393-94, 307 P.2d at 102-03.